IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Relator,	)	Cause No. SC 86013
vs.	)	
HONORABLE MATT BLUNT, Secretary of State,	)	
Respondent.	)	

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

The Attorney General seeks a writ compelling the Secretary of State to "take all necessary steps within the power of his office," to place a proposed constitutional amendment on the ballot for an August 3, 2004, special election. The Secretary's authority is triggered only when he "receives" a resolution "adopted" by the General Assembly. The undisputed evidence from the Senate shows that the General Assembly has yet to complete the steps it deems necessary to produce a "true and accurate" final version of the resolution. Thus, the Senate has not adopted the resolution and the Secretary has not received it. Mandamus clearly does not lie to require the Secretary to take action on a resolution that he does not have and does not exist. Secretary of State Matt Blunt respectfully requests that the Petition be dismissed.

FACTUAL BACKGROUND

1. The Status of Senate Joint Resolution (SJR) 29

On March 1, 2004, the Missouri Senate passed SJR 29, proposing to the voters of Missouri a constitutional amendment. (Rel. Exhs. at 12). On May 14, 2004, the Missouri House of Representatives passed SJR 29 as well. (Rel. Exhs. at 100-101).

The General Assembly is now performing the constitutional task of enrolling and engrossing bills and resolutions, including SJR 29. (Affidavit of Terry Spieler, Secretary of the Senate, Exh. 1 hereto, at 1; *see* Mo. Const., art. III, sec. 20(a)). The enrollment and engrossing process is used to determine the "true and accurate" language of all measures passed by the Missouri Senate and to correct errors. (Spieler Aff. at 1). "It is not unusual" for the Senate staff to find errors in the truly agreed to and finally passed version of a bill or resolution, as part of the enrolling and engrossing process. (Spieler Aff. at 1). By Senate rule, the enrolling and engrossing process applies to resolutions to amend the constitution just as it does to bills. (Spieler Aff. at 1).

The original and official copy of SJR 29 is currently in the custody of the Secretary of the Senate and has not been delivered to the Secretary of State. (Spieler Aff. at 1). The Missouri Attorney General does not have it either. (Spieler Aff. at 1-2). The "true and accurate" version of the bill will exist only after the General Assembly completes its work by finishing the enrolling and

engrossing process and it is signed by the presiding officers of the House and Senate. (Spieler Aff. at 2).

2. **Procedural Posture.**

On May 19, 2004, the Governor transmitted to the Secretary of State a "Proclamation" purporting to set August 3, 2004, as the special election day for the amendment to the constitution proposed by SJR 29. (Rel. Exhs. at 114). That proclamation did not have a copy of any version of SJR, contained a typographical error in that a period was omitted from the text of SJR 29. and did not include the full text of SJR 29. (Compare Rel. Exhs. at 114 with 113). The Attorney General filed a lawsuit in the Cole County Circuit Court on May 20, 2004, styled, "Petition for Preliminary and Permanent Writ of Mandamus, or in the Alternative, for Declaratory Judgment." (Copy at Exh. 2 hereto). An exhibit to that petition included an uncertified copy of the truly agreed to and finally passed version of SJR 29. On May 21, the Circuit Court denied the petition in its entirety. After a failed effort to obtain a writ from this Court on May 21st, the Attorney General filed a Petition for Writ of Mandamus in the Court of Appeals that same day. On May 24th, the Court of Appeals denied the Petition after hearing oral argument and accepting Suggestions and exhibits from the Secretary.

LEGAL ARGUMENT

I. The Petition for Writ of Mandamus should be denied because mandamus does not lie in that (a) the Secretary of State has no clearly established duty of law that can be enforced by mandamus; (b) the Attorney General has an

adequate remedy at law, the declaratory judgment action he filed in the Cole County Circuit Court; and (c) the relief sought cannot be granted in a mandamus case

"The writ of mandamus . . .issues only where there is a clear and specific right to be enforced, or a duty to which ought to be and can be performed, and where there is no other specific and adequate legal remedy." *State ex rel. Kelcor, Inc., v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 402 (Mo. App. 1998, per Teitleman, J.).

As discussed in more detail in section II, if the General Assembly "adopts" a resolution proposing a constitutional amendment, upon "receiving" such a resolution, the Secretary of State is to "promptly" transmit it to the Auditor. § 116.160 RSMo. Assuming the General Assembly did not include a ballot summary statement in the resolution, the Secretary of State is to prepare such a statement and transmit it to the Attorney General within twenty days of receiving the resolution. *Id.* The Attorney General's thesis in this case is that the Secretary of State has a clearly established duty to treat the Governor's proclamation received May 19, the uncertified copy of SJR attached to the Cole County Circuit Court petition received on May 20, or the certified copy that is an exhibit in the case received on May 21 as the "adopted" resolution. The Secretary of State, as is argued in detail in section II below, contends that his responsibility and authority are triggered only upon receipt of the "true and accurate" version from the General Assembly, which has not occurred.

The question before this Court is whether the Attorney General is right that the proclamation or either copy of the truly agreed to and finally passed version of SJR 29 is "receipt" by the Secretary of a measure "adopted" by the General Assembly. This mandamus proceeding cannot resolve this question. "The purpose of mandamus. . .is to execute and not adjudicate; it coerces the performance of a duty already defined by law." *State ex rel. City of Crestwood v. Lohman,* 895 S.W.2d 22, 27 (Mo. App. (1995); *State ex rel. Gladfelter v. Lewis,* 595 S.W.2d 788, 789 (Mo. App. 1980). "Mandamus may not be used to establish new rights, but instead may be used only to enforce existing rights." *State ex el. City of Blue Springs v. Rice,* 853 S.W.2d 918, 920 (Mo. banc 1993). "The writ of mandamus compels a legal right already established, but does not establish a legal right." *Gladfelter*, 595 S.W.2d at 790.

There is no clear duty on the part of the Secretary of State to act on a proclamation that inaccurately describes a resolution, on an uncertified copy of a resolution, or on a preliminary version of a resolution that is not, in the judgment of the General Assembly, "true and accurate." The Attorney General has by no stretch of the imagination cited any authority that establishes such a "clear duty." At a minimum, this Court would have to interpret the meaning of "adopt" and "receipt" as those words are used in section 116.160. Novel questions of statutory construction cannot be made in a Mandamus action.

Indeed, the Attorney General's Circuit Court lawsuit essentially concedes this point because it coupled a mandamus action with a declaratory judgment

action. It is axiomatic that "[m]andamus will not lie where another adequate remedy is available to relator." *State ex rel. J. C. Nichols Co. v. Boley*, 853 S.W. 2d 923, 924 (Mo. banc 1993). The Attorney General chose to file a declaratory judgment action in the Cole County Circuit Court (see Exh. 2, hereto). Where a declaratory judgment action is filed, it provides an adequate remedy at law and no writ of mandamus should issue. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 266-67 (Mo. banc 1980); *Kelcor,* 966 S.W.2d at 402.

Rather than seeking to establish the Secretary's duty by this mandamus case, the Attorney General should have appealed the decision of the Cole County Circuit Court to deny his petition for a declaratory judgment. The Circuit Court's order denied the petition without qualification, clearly ruling against the Attorney General on the declaratory judgment. The fact that time may be short is not relevant: "mandamus is not a 'short cut for the speedy resolution of disputes that adequately may be resolved by other means.'" *Kelcor,* 966 S.W.2d at 402, *quoting* Kelley, 595 S.w.2d at 268. The decision of the Cole County Circuit Court was issued at about 10 a.m. on Friday, May 21. That day, the Attorney General filed writ cases in the Supreme Court and here. Clearly, the Attorney General could have filed an expedited appeal of the declaratory judgment case.

Another procedural failure in this case is that the relief sought by the Petition is overly broad. "Mandamus will not lie to compel an act when its performance is discretionary." *McDonald v. City of Brentwood*, 66 S.W.3d 46, 50 (Mo. App. 2001). The Petition asks that the writ order the Secretary to "take all

necessary steps within the power of his office. . .to effect the Governor's Proclamation that the proposed constitutional amendment set forth in the Truly Agreed and Finally Passed SJR 29 be put to a vote of the people of this state in a special election on August 3, 2004." That tautology is so vague that it provides the Secretary no idea what he is to do, and the reference to "all powers" includes discretionary ones. Even if this court were to accept every point set forth by the Attorney General, the Attorney General has established no right to such broad relief. For example, if one assumes the most extreme position taken by the Attorney General, that the Secretary of State received SJR 29 on May 19 when the Proclamation was delivered, the Secretary would have only one immediate nondiscretionary task: to "forward the resolution or bill to the state auditor." § 116.160 RSMo. The Secretary would have twenty days from May 19 to prepare a summary statement and transmit it to the Attorney General. The Attorney General has made no argument suggesting that this court has the authority to shorten the unambiguous twenty day time period. Thus, at most, this Court could enter a writ ordering the Secretary to promptly send a copy of the truly agreed to and finally passed version of SJR to the Auditor and directing the Secretary to deliver the summary statement to the Attorney General by June 8 (twenty days from May 19).

II. The Petition for Writ of Mandamus should be denied because under article XII, section 2(b) of the Constitution and Section 116.160 RSMo, the

Secretary's duties have not been triggered because he has not "received" a resolution "adopted" by the General Assembly.[1]

The starting point is article XII. section 2(b) of the Constitution, addressing submission of constitutional amendments to the voters. In pertinent part, it reads: "All amendments proposed by the general assembly. . .shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments." Thus, section 2(b) establishes the principle that the vote on a constitutional amendment shall be "as provided by law."

The law that gives the Secretary of State authority is section 116.160, RSMo. It provides in pertinent part:

> If the general assembly adopts a joint resolution proposing a constitutional amendment or a bill without a fiscal note summary, which is to be referred to a vote of the people, after receipt of such resolution or bill the secretary of state shall promptly forward the resolution or bill to the state auditor. If the general assembly adopts a joint resolution proposing a constitutional amendment for a bill without an official summary statement, which is to be referred to a vote of the people, within twenty days after receipt of the resolution or bill, the

[1] This section responds to sections 1 and 2 of the Attorney General's Suggestions in Support of Writ of Mandamus.

secretary of state shall prepare and transmit to the attorney general a summary statement of the measure as the proposed summary statement. (Emphasis added).

Thus, the constitution directs that state officials act only pursuant to law. By section 116.160, the Secretary's authority and duties to (1) forward the resolution to the Auditor and; (2) in some cases prepare and transmit to the Attorney General a summary statement within twenty days, are triggered only when he or she "receives" a resolution that has been "adopted" by the General Assembly.

A. The General Assembly has not adopted SJR 29

The first question, then, is whether the General Assembly has "adopted" SJR 29. The undisputed evidence shows that it has not yet done so. The Affidavit of Terry Spieler, Secretary of the Senate,[2] plainly states: "The only 'true and accurate' version of SJR 29 will exist only after SJR 29 is signed by the presiding officers of the House and Senate." (Spieler Aff. at 2). The Attorney General offers no definition of "adopted," but common sense dictates that the legislature has not adopted a measure until it is willing to authenticate it as "true and accurate."

The Spieler affidavit shows that the General Assembly has not adopted SJR 29 as a matter of fact. Equally, it has not done so as a matter of law. Article III,

[2] Ms. Spieler has served as the Secretary of the Senate since 1982, under both democratic and republican leadership.

section 20(a) of the Constitution provides for enrolling, engrossing and signing of bills: "The period between the first Friday following the second Monday in May and May thirtieth shall be devoted to the enrolling, engrossing, and the signing in open session by officers of the respective houses of bills passed prior to 6:00 p.m. on the first Friday following the second Monday in May." This is no mere formality. The enrolling, engrossing, and signing provision performs the essential function of ensuring that there are no errors and creates the "the authentic text of the bill." *State ex rel. Ashcroft v. Blunt*, 696 S.W.2d 329, 330 (Mo. banc 1985). It is used to determine "the true and accurate language of all measures passed by the Missouri Senate and to correct errors." (Spieler Aff. at 1).

In addition to enrolling and engrossing, the Constitution requires that measures be signed in open session by the presiding officer of each house. Article III, section 30 provides that "No bill shall become a law until it is signed by the presiding officer of each house in open session[.]" Section 30 promotes accuracy by permitting input on any errors that may have occurred in producing the measure. For example, any member of the Senate may object that a "substitution, omission or insertion has occurred, so that the bill proposed to be signed is not the same in substance and form as when considered and passed by the senate or house." Senate Rule 67 (copy attached as Exhibit 3). The Senate is to take up such objections and decide whether to sustain them. *Id.*

The evidence before this Court is undisputed that SJR 29 has not been enrolled, engrossed, or signed by the presiding officers in open sessions. The

version of SJR attached to the Petition is a copy of the truly agreed to and finally passed version, not the enrolled, engrossed, and signed version. (Pet. Exh. At 112; Spieler Aff. at 2). It is neither the "true and accurate version" (Spieler Aff. at 2) nor is it the "authentic text." *State ex rel. Ashcroft v. Blunt*, 696 S.W.2d 329, 330 (Mo. banc 1985). According to the Secretary of the Senate, it would not be unusual for the version of SJR 29 attached to the petition in this case to contain an error. That is why she certified it only to be "true and complete" not "true and accurate." (Spieler Aff. at 2).

Nonetheless, the Attorney General seeks a writ ordering the Secretary to State to take action on the truly agreed to and finally passed version of SJR 29, arguing that a photocopy of that version or a description of it in the Governor's proclamation is sufficient. The Attorney General's thesis is that a joint resolution is not a bill, and thus, the enrolling, engrossing, and signature requirements do not apply. This argument fails for multiple reasons.

First, it fails as a matter of fact, because the General Assembly has made the determination to treat resolutions proposing constitutional amendments and bills the same for enrollment, engrossing, and signature purposes. Senate Rule 70 reads: "All resolutions proposing amendments to the constitution shall be treated, in all respects, in the introduction and form of proceedings on them in the Senate, in the same manner as bills." (Copy attached as Exhibit 3). Equally, House Rule 57 reads: "All joint and concurrent resolutions designed to submit to the qualified voters of the state amendments to the constitution of the state of Missouri, to be

voted upon by such voters, shall be read on three separate days, and shall be reported upon by the committee of the House, and shall otherwise be proceeded upon in like manner as a bill." (Copy attached as Exhibit 4). It is up to the General Assembly, not the Attorney General, to establish the proper procedures for accurate bill passage.

Second, the Attorney General's argument fails as a matter of law. He suggests that SJR 29 does not need to be signed, invoking article IV, section 8 of the Constitution. It says merely that Constitutional amendments need not be submitted to the Governor, but is silent on the procedures for such amendments within the General Assembly.

The two cases cited by the Attorney General do not help him either. In *Brown v. Morris*, the General assembly passed Senate Bill 351 placing a tax referendum on the ballot. The Speaker of the House refused to sign the bill. The *original enrolled bill* and *the original perfected copy of the bill* were delivered to the office of the Secretary of State. The election was conducted and the voters approved the tax. The Governor issued his proclamation declaring the tax approved. Plaintiffs sued the Director of Revenue, claiming that the tax was invalid because the Speaker had not signed the bill.

The Supreme Court upheld the tax, but limited its holding to the unique facts of the case, stating that "after a statute has been passed by a vote of the people and promulgated as the law, [the] court's sphere of inquiry is and should be whether the law itself in its final form is constitutional as to its provisions, and not

whether there was a constitutional defect in the proceedings leading to its final passage." *Brown*, 290 SW.2d 160, 165 (Mo. banc 1956). Of course, the case at bar has yet to be submitted to the voters, so the *Brown* holding is not on point. Moreover, nothing in *Brown* addresses the issue before the court now—whether the Secretary of State has "received" an "adopted" resolution. In fact, *Brown* supports the Secretary's position that the resolution received by the Secretary must the original enrolled resolution, because in *Brown* that was what the Secretary "received."

Equally, *Bohrer v. Toberman* is no help to the Attorney General and actually undermines his position. The *Bohrer* court said that where there is "doubt. . .as to the validity of the challenged legislative action" in the context of an initiative, "under well-established precedents, the deference due a co-orordinate branch of the government requires that the doubt be resolved in favor of, and against nullifying, the action taken, . . . The courts cannot interfere with such legislative action, unless it is clear that the action taken is contrary to some mandate of the Constitution." *Bohrer*, 227 S.W.2d 719, 723-724 (Mo. Banc. 1950). Indeed, *Bohrer* establishes that the legislature has "all the powers and privileges which are necessary to enable it to exercise in a respects. . .its appropriate functions" unless expressly restrained by the Constitution or law. *Id.* at 723. Neither the constitution nor any law forbids the General Assembly from enrolling, engrossing and signing resolutions to promote accuracy. Thus, *Bohrer* stands for the proposition that the Attorney General and this court ought to defer to

the decision made by the General Assembly to enroll, engross and sign resolutions proposing constitutional amendments.[3]

Even though the General Assembly has made the considered judgment that the accuracy gained by enrollment, engrossing, and signing in open sessions should apply to resolutions proposing constitutional amendments, and the law supports that conclusion, the Attorney General would unwisely forsake the benefits of accuracy for haste. Thus, not only do the undisputed facts and the law support the Secretary of State, so do common sense and wise public policy.

First, there is no reason to believe that the increased accuracy promoted by the enrolling, engrossing, and signature requirements is any less important for a constitutional amendment than for any other measure. Indeed, given the gravity of amending the constitution it would appear just the opposite.

Second, if the Attorney General truly believes that the enrollment, engrossing, and signature requirements do not apply to resolutions proposing

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[3] The Secretary of State believes the Court and the Attorney General should defer to the legislature's decision to enroll, engross and sign resolutions proposing constitutional amendments, and there is little need to resort to case law. Nonetheless, we note that Missouri courts have generally concluded that joint resolutions are to be treated as if they are bills. *See State Royal Ins. v. Dir. of Mo. Dept. of Ins.*, 894 S.W.2d 159, 162 (Mo. banc 1995); *State ex rel. Wilcox v Draper*, 50 Mo. 24 (1872).

constitutional amendments, it appears that he has sued the wrong person in this case. That theory would properly be directed at the General Assembly and its rules, not at the Secretary.

Third, the Attorney General's assertion that the Secretary of State must act based on a journal entry and a photocopy of what is (in light of the Spieler Affidavit) now plainly not the final version of SJR 29 is an invitation to chaos. When the Secretary of State receives a resolution proposing a constitutional amendment, he is charged with transmitting it to the State Auditor for a fiscal note summary (if the General Assembly does not provide one). §§ 116.160, .170 RSMo. The Secretary of State is given twenty days to prepare a summary statement and submit that to the Attorney General. § 116.160 RSMo. To have state officials performing such tasks when they do not and cannot know what the true legislative language will be is an invitation to errors and confusion.

B. The Secretary of State has not received SJR 29

The second inquiry under section 116.160 is whether the Secretary of State has "received" an "adopted" bill. The Attorney General takes the position that the Secretary received the resolution (1) when he got the Governor's proclamation, even though there was not even a copy of any version of SJR 29 attached to it, (2) when he received an uncertified copy of a version of SJR 29 with the Cole County lawsuit, or (3) when he received the exhibits to the Petition in this case.

The undisputed facts show that the Secretary has not received what the General Assembly considers the "true and accurate" version of SJR 29. (Spieler

Aff. at 2). Thus, the Attorney General's effort to trivialize the Secretary's position by referencing the form the Secretary "would prefer" from the party he "would prefer" is simply wrong. The Secretary's insistence that receipt means the "true and accurate" version, as defined by the legislature, is not only not trivial, it is his sworn duty. The Secretary has received nothing showing that a resolution conforming to the constitution and the rules of the General Assembly have been met. In the absence of such receipt, the Secretary's duties and authority under section 116.160 are not triggered.[4]

The Attorney General's position on "receipt" is both inconsistent and indefensible. He first argues that the Secretary received SJR 29 when the Governor delivered his proclamation. That proclamation did not attach a copy of the truly agreed to and finally passed version of SJR 29, it contained a typographical error by omitting a period, and did not fully quote SJR 29. He second argues that the Secretary received SJR 29 when the circuit court petition was filed, although the version attached to that was not certified by the Secretary of the Senate or anyone else. He third argues that the Secretary received SJR 29 when the exhibits to the petition in this case were delivered, with a copy certified to be "true and complete" but not "true and accurate."

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[4] *See State Royal Ins. V. Dir. of Revenue*, 894 S.W.2d at 162 (interpreting word "receipt" narrowly in context of receipt of official documents by the members of the House).

The Attorney General's multiple theories as to what constitutes "receipt" for purposes of section 116.160 shows the folly of his position. The Governor's proclamation was incomplete and contained a typographical error. The Attorney General attached two different versions to his petitions. When the text of the constitution is at stake, every effort to avoid such errors should be made. That is precisely why the Secretary of State stands firm that he will wait until the General Assembly completes the process it has developed to promote a level of accuracy that the Governor and the Attorney General failed to achieve.

III. The Petition for Writ of Mandamus should be denied because the Attorney General's Position undermines the statutory responsibilities of the Secretary of State, the Auditor and the Attorney General for constitutional amendments[5]

The General Assembly has developed an orderly process for amending the Constitution, and the Attorney General's position threatens it. For example, after the Secretary receives an adopted resolution, the Secretary is to send it to the auditor for assessment of the fiscal impact of the measure. By the statute,

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[5] This section responds to Sections 4 and 5 of the Suggestions. The Secretary makes no response to Section 3, because it is based on unripe speculation about what the legislature will or will not do. Section 3 of the Attorney General's Suggestions makes no difference to the resolution of this case.

"Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact . . . provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state." § 116.175.1, RSMo. The stature establishes a ten-day public comment period for the fiscal note. Apparently the auditor intends to provide no such comment period in this case. (See Rel. Exh. G). While the Auditor's duties are not the business of the Secretary of State, the Secretary notes that the haste to act apparently will have the effect of denying the public of its right to comment on the fiscal note.

Equally, the Secretary of State has twenty days to prepare a summary statement if the legislature does not provide one. §116.160 RSMo. The Secretary then submits it to the Attorney General for approval of the "legal content and form of the proposed amendment." *Id.*

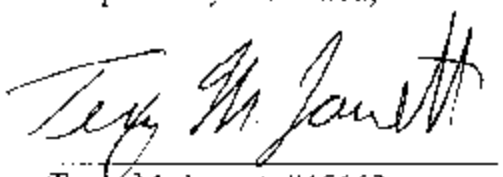
The Attorney General offers no reason for this court to upset the orderly statutory procedure in order to have a special election on the amendment proposed by SJR 29. The constitution establishes that the normal date for a vote on a constitutional amendment is the general election in November, not the primary in August. Mo. Const. Art. XII, § 2(b). Once the General Assembly completes its work on SJR 29. and assuming that the enrolling, engrossing, and signature requirements are met and all is in order, the amendment will be voted on at the November general election. or at some other special election called by the Governor prior thereto, provided he complies with the statutory requirements.

Equally, article XII, section 2(b) establishes that all amendments shall be submitted to the voters "as may be provided by law." This constitutional mandate imposes a duty on all officials involved—the General Assembly, the Governor, the Secretary of State, the Auditor and the Attorney General—to act only according to statute. As set forth above, there is no statutory authority for the position taken by the Attorney General. In the absence of such authority, mandamus does not lie.

CONCLUSION

For the reasons set out above, Secretary of State Matt Blunt respectfully asks that the court dismiss the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were hand delivered on this 24th day of May, 2004, to the following:

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